

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MARLON OLIVAS,

Petitioner,

vs.

BRIAN E. WILLIAMS, et al.,

Respondents.

Case No. 2:10-CV-00571-GMN-(RJJ)


ORDER

Pursuant to Circuit Rule 22-3(a), the court referred (#5) this action to the United States Court of Appeals for the Ninth Circuit for a determination whether petitioner is authorized to file a second or successive petition for a writ of habeas corpus. See 28 U.S.C. § 2244(b). Petitioner has filed a notice of appeal (#7), and the clerk of the court has created a placeholder motion for a certificate of appealability (#8).

Petitioner may appeal from a final order of this court, subject to the issuance of a certificate of appealability. 28 U.S.C. § 2253. It is unclear whether the reference to the court of appeals acts as a final order. To the extent that the court did enter a final order, the facts and the law are clear. The court dismissed as untimely petitioner's prior habeas corpus petition pursuant to 28 U.S.C. § 2254. See Olivas v. Neven, Case No. 2:04-CV-01643-JCM-(PAL). For the purposes of requiring authorization pursuant to 28 U.S.C. § 2244(b) to file a second or successive petition, an untimely petition acts as a first petition. McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009). Reasonable jurists would not disagree with the court's conclusions.

1 IT IS THEREFORE ORDERED that petitioner's motion for a certificate of
2 appealability (#8) is **DENIED**.

3 DATED: July 9, 2010.

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7 GLORIA M. NAVARRO
8 United States District Judge
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